Supreme Court, U.S.
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96 835 SEP 23 1996

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No.

In The

Supreme Court of the United States

October Term, 1996

LESLIE R. BELL,
Petitioner

v.

UNITED STATES POSTAL SERVICE,
Respondent

On Petition For Writ Of Certiorari To
The United States Circuit Court Of Appeals
For The District Of Columbia

PETITION FOR WRIT OF CERTIORARI

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15 pp

QUESTIONS PRESENTED

The Veterans Preference Act of 1944 requires that veterans be provided retention preference in reduction-in-force actions. 5 C.F.R. 351 establishes procedures for use in RIF actions to comply with the act as codified in 5 U.S.C 3502(c). The agency admittedly did not follow these procedures when it removed the preference eligible petitioner from his position and demoted him.

On appeal, the Court of Appeals for the Federal Circuit named the agency rather than the Board as respondent and stated the appellant's arguments need not be considered as the agency did what the Board ordered. It would not address the Board's failure to enforce its final order.

The questions presented for review are:

A. Whether the Merit Systems Protection Board's authority extends to redefining the remedies for unlawful removals defined in binding precedence of the Supreme Court and the United States Court of Appeals for the Federal Circuit and is it required to enforce its final decisions and codified regulations ?

B. Whether the United States Court of Appeals for The Federal Circuit may in its decisions fail to follow its legislated mandate under the law, applicable case law, the precedence established by decisions of the Supreme Court and its own decisions in the absence of compelling argument for change?

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The petitioner L. R. Bell respectfully prays that a writ of certiorari issue to review the judgement dated April 15, 1996 of the Court of Appeals for the Federal Circuit, District of Columbia on appeal from the Merit Systems Protection Board's decision in case number DC351930749-X-1.

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OPINIONS BELOW

In this matter there are five central opinions and/or orders from the Merit Systems Protection Board and the Court of Appeals for the Federal Circuit each of which is reproduced in the accompanying appendices. These are:

1. The Order of the United States Court of Appeals for the Federal Circuit under Docket No. 96-3053 which appears as Appendix A. (Ap p.I)
2. The Decision of the United States Court of Appeals for the Federal Circuit under Docket Number 96-3053 dated 4/15/96. which appears as Appendix A1 (Ap p.III)
Docket Number 96-3053 dated June 24, 1996
3. The Initial Decision under MSPB Docket No. DC-0351-93-0749-I-1 Dated October 29, 1993 which appears as Appendix D.(Ap p.XXII)
4. The Final Decision under MSPB Docket No. DC-0351-93-0749-I-1 included as Daniel L. Anderson, et. al., v. United States Postal Service, SL-0351-94-0018-I-1 dated

September 1, 1994 which appears as Appendix C. (Ap p.X)
5. The second Merit Systems Protection Board final decision under Docket No. DC-0351-93-0749-X-1 dated November 1, 1996 which appears as Appendix E. (Ap p.XXX)

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STATEMENT OF THE BASIS OF JURISDICTION

The date of the judgement sought to be overturned is that of the Court of Appeals for the Federal Circuit dated April 15, 1996. This judgement affirmed the final order of the Merit Systems Protection Board dated November 1, 1995 dismissing the petitioner's petition for enforcement.

The petitioner's request for rehearing was denied in the United States Court of Appeals Order dated June 24, 1996 under Docket Number 96-3053. A 60 day extension of time was allowed effective September 26, 1996 for request of a writ of certiorari in this matter pursuant to the letter of the same date from the Office of the Clerk, Supreme Court of the United States.

The statutory provisions believed to confer jurisdiction on the court are:
a. 28 U.S.C. Section 1254, Courts of appeals; certiorari; certified questions states:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . ."

b. Title 5 U.S.C Sec. 7703. Judicial review of decisions of the Merit Systems Protection Board states:

" (a)(1) Any employee or applicant for employment adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision . . ."

"(2) The Board shall be named respondent in any proceeding brought pursuant to this subsection, unless the employee or applicant for employment seeks review of a final order or decision on the merits on the underlying personnel action or on a request for attorney fees, in which case the agency responsible for taking the personnel action shall be the respondent.

" (b)(1) Except as provided in paragraph (2) of this subsection, a petition to review a final order or final decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit. ..."

****

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause, Article VI. Clause 2 of the United States Constitution, provides in pertinent part:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land. . . ."

Statutes:

The Veterans Preference Act of 1944 in Section 12 provides:

"In any reduction in personnel in any civilian service in any government agency, competing employees shall be released in accordance with Civil Service Commission regulations which shall give due effect to tenure of employment, military preference, length of service and efficiency ratings: . . Provided further, That preference employees whose efficiency ratings are good or better shall be retained in preference to all other competing employees . . . "

This Public Law is codified as 5 U.S.C. 3502 which states:

"An employee who is entitled to retention preference and whose performance has not been rated unacceptable under a performance appraisal system implemented under chapter 43 of this title is to be retained in preference to other competing employees."

28 U.S.C. Sec. 1254 states in part:

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . ."

5 U.S.C Sec. 7701(c)(2) states in part:

"Notwithstanding paragraph (1) the agency's decision may not be sustained under subsection (b) of this section if the employee or applicant for employment--

(A) shows harmful error in the application of the agency's procedures in arriving at such decision;

(B) shows that the decision was based on any prohibited personnel practice described in section 2302(b) of this title; or,

(c) shows that the decision was not in accordance with law.

5 U.S.C Sec.7703(c) which states:

(c) "In any case filed in the United States Court of Appeals for the Federal Circuit, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be--

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(2) obtained without procedures required by law, rule, or regulation having been followed; or,
(3) unsupported by substantial evidence;... "

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STATEMENT OF THE CASE

The preference eligible petitioner was dismissed from his postal service position as Manager, Drafting Branch EAS-23 on October 7, 1992 as a part of the Postal Service realignment of 1992. The petitioner served in the position as a saved grade, saved pay EAS-27. The petitioner was displaced by a non preference eligible. The agency states it did not follow RIF procedures as the 1992 realignment provided saved pay and grade to those demoted. The MSPB ruled the action was a RIF and the agency was required to follow RIF procedures even though it provided saved pay and saved grade. Brown v United States Postal Service, SL0752930054-I-1 (July 21, 1993) at 6

There is no contention that the agency did not follow 5 C.F.R. 351 and did not follow the provisions of the Veteran's Preference Act of 1944 as codified in 5 U.S.C. 3502(c).

The petitioner was initially assigned to an EAS 24 non management position with saved pay and saved grade. When the petitioner advised he would accept the position but

appeal, he was relieved of all duties until August 23, 1993 when the petitioner was assigned to the position Supervisor, Customer Services EAS-16 supervising carriers in the Silver Spring Post Office with EAS-27 saved pay and grade.

The petitioner appealed his demotion to the Board on September 7, 1993. (DC-0351-93-0749-I-1) The appeal stated: the petitioner was demoted without use of RIF procedures which violated the petitioner's substantive rights under the law; the positions Manager, Drafting Branch and Manager, Configuration Management are the same; restoration of the petitioner to his renamed now higher grade position Manager, Configuration Management is required under postal regulations and constitutes restoration to the *status quo ante* under the law; and, the agency engaged in prohibited personnel practices.

The agency responded that it was not required to follow RIF procedures so long as it offered saved pay and saved grade and that the Board had improperly defined "demotion". The agency did not dispute the two positions Manager, Drafting Branch and Manager Configuration Management were essentially the same or offer position descriptions to show the functions were different or address other arguments raised by the petitioner.

The MSPB ALJ's Initial Decision dated October 29, 1993 ordered the agency to cancel the appellant's demotion and retroactively restore him to his former position.

The MSPB in Anderson, et. al., Appellants v. U.S. Postal Service dated September 1, 1994 issued its Final Order which directed the agency to cancel the demotions and restore 57 appellants including the petitioner to the effective date of that action. This was the petitioner's final decision. The Board stated that other issues had been raised by appellants but need not be addressed as all appellants were already entitled to full restoration.

The agency failed to comply and the petitioner and others filed for enforcement. The agency was found by the Board in non-compliance with the Board's final order in Anderson.. The agency in a March 24, 1995 meeting with the Board on one enforcement case (Sink v. U. S. Postal Service, AT-0351-93-0384-X-1 (March 24,1995) stated it would conduct a "Compliance RIF" and issue all demoted preference eligibles retroactive Notices of RIF as compliance. There are no laws or regulations mentioning or defining a "Compliance RIF". The "Compliance RIF" is an agency invention and the agency admits there was no legal precedent for the conduct of a "Compliance RIF".

The Board approved. Notices of RIF dated April 17, 1995 were issued to about 800 preference eligibles that had been demoted in the 1992 action. The Board then declared that the act of issuing Notices of RIF was the same as restoration to the *status quo ante* and the agency had complied with its Final Order requiring restoration of appellants to their former positions or the *status quo ante* by issuing the Notices of RIF . It further stated that if appellants wanted to appeal the results of the "Compliance RIF", which it redesignated the "1995 RIF", a new filing was required.

The petitioner appealed to the United State Court of Appeals for the Federal Circuit pursuant to 5 U.S.C. 7703(b)(1) in an appeal dated January 4, 1996. The appeal states in part the Board erred in failing to: enforce its final decision; follow Supreme Court, Court of appeals for the Federal Circuit and its own precedence; follow its own procedures; and, consider the agency's engaging in prohibited personnel practices.

The appeal further states the Board's advising the agency to issue Notices of RIF after the fact told the agency to violate RIF regulations contained in 5 C.F.R. 351 and the affected appellants' substantive rights.

The Circuit Court affirmed the Board's

action stating that the agency did what the Board told it do when it issued Notices of RIF and need not address the issues raised by the petitioner.

The petitioner now petitions the Supreme Court for a Writ of Certiorari to reverse this decision based on the arguments below.

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Reasons For Granting The Writ

The action taken by the Board in this case and the Court of Appeals for the Federal Circuit's affirmation of that action, introduces a new concept that a government agency can supplant a provision of public law or a controlling court's decision with a provision it designates as equivalent.

In the present application of the concept, remedies under the law supported by years of binding case precedence have been set aside by an agency determination.

The Board and the agency contrived a new device, the "Compliance RIF", supported by new Board precedence created solely in the 1992 realignment cases and ignored the precedence established previously by the Supreme Court and the United States Court of Appeals For The Federal Circuit. The new precedence was embodied in Sink v. U.S. Postal Service, 65 M.S.P.R. 628, 636 (1994)

which at 2 states:

> " . . . the Board found that compliance with a materially identical Board final order could be effected by (a) restoring the appellant to the position he held prior to the agency's 1992-93 nationwide restructuring, or (b)issuing the appellant a specific RIF notice consistent with 5 C.F.R. 351.801(a)(1). " Sink at 2

The Board then stated the appellants' positions had been abolished and accordingly the only requirement was to8 issue the appellants Notices of RIF.

The "identical Board final order " referred to by the Board was Anderson v. United States Postal Service SL-0351-94-0018-I-1 (September 1, 1994). At 7 this order directs the agency to cancel each appellant's demotion and restore him or her retroactive to the effective date of that action citing Kerr v. National Endowment for the Arts , 726 F.2d 730 (Fed. Cir. 1984) In the petitioner' case receiving a Notice of RIF is equivalent to restoration to his former position at a higher grade with retroactive pay.

The purpose of an MSPB order cancelling an agency's action is to place the employee as nearly as possible in the *status quo ante*. (Kerr at 730). Issuing "Notices of RIF" is clearly not "materially identical" to the return of the appellants to the

status quo ante.

The Supreme Court long ago stated the general rule is, that when a wrong has been done, and the law gives a remedy , the compensation shall be equal to the remedy. The latter is the standard by which the former is measured. The injured party is to be placed as near as may be, in the situation he would have occupied if the wrong had not been committed . (Wicker v. Hoppock, 6 Wall. (73 U.S.) 94, 99, 18 L.Ed. 752 (1867).

CONCLUSION: Allowing the decision to stand will nullify retention provisions of the Veterans Preference Act of 1944 and the Civil Service Reform Act of 1978 and nullify long standing precedence of the Supreme Court and the United States Court of Appeals for the Federal Circuit which require restoration to the *status quo ante* in cases of unlawful removal. Allowing the decision to stand will require personnel who have proved their substantive rights have been violated in a RIF to accept a "re-RIF" as the full extent of their legal remedy and be required to begin a new appeal process to redress any issue in the new "re-RIF".

The decision will make significant changes in legislated public policy through administrative agency cabals to increase their own power through the simple action

of ruling that their remedy is equivalent to that provided under law, rule or regulation or legal precedence.

No precedent for the Board's act existed before the action was taken. The Board is creating "new law" which will broadly affect public policy as legislated in the Veteran's Preference Act of 1944 and the Civil Service Reform Act of 1978.

An equally serious harm is to the rule of law. The law of the case doctrine is based on sound public policy that litigation should come to an end. The law of the case doctrine has been applied to administrative agency proceedings. Consistency derived from the law of the case doctrine avoids the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions. (Key v. Sullivan , 925 F.2d 1056, 1060 (7th Cir.1991) at 1060, quoting Montana v. United States, 440 U.S. 147, 153-54 .

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Argument Amplifying the Reasons Relied on For Allowance of the Writ

THE DECISION OF THE UNITED STATES COURT OF

APPEALS FOR THE FEDERAL CIRCUIT IS IN DIRECT CONFLICT WITH DECISIONS OF THIS COURT AND OTHER CIRCUIT COURTS OF APPEALS AND IT MANDATE UNDER 5 U.S.C.7703(c)

A. Whether the Merit Systems Protection Board's authority extends to redefining the remedies for unlawful removals defined in binding precedence of the Supreme Court and the United States Court of Appeals for the Federal Circuit and is it required to enforce its final decisions and codified regulations ?

1. The Law Requires Preference Eligibles be Retained In Preference to All Others

The Veterans Preference Act of 1944 in Section 12 provides that preference eligibles shall be retained in preference to all others. See text of law at 4 above.

This Public Law is codified as 5 U.S.C 3502 which states:

> "An employee who is entitled to retention preference and whose performance has not been rated unacceptable under a performance appraisal system implemented under chapter 43 of this title is to be retained in preference to other competing employees."

The Supremacy Clause, Article VI. Clause 2 of the United States Constitution, provides in pertinent part:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land. . . ."

2. The Board's Final Decision Determined The Agency Violated The Petitioner's Substantive Right In His Removal And the Petitioner Is Entitled to Have the Action Reversed and Be Restored To The *Status Quo Ante*

> "When an agency takes a reduction-in-force action but fails to use reduction-in-force procedures, it has violated the employee's substantive and procedural reduction-in-force rights, and the action must be reversed. It is undisputed that the Agency did not use reduction-in-force procedures to demote the appellant. Accordingly, the action must be reversed. Because, under Brown, the appellant is entitled to the full relief he requested, the hearing he requested is not warranted." (Initial Decision under Bell, DC-0351-93-0749-I-1 dated October 29, 1993 at 2 citing McClure v. Federal Energy Management Agency, 32 M.S.P.R. 672, 676 (1987) at 676).

The relief the appellant requested was to reverse the agency action and restore the appellant to his prior, renamed position of

Manager, Configuration Management at its new rate of pay retroactive to the effective date of his removal from that position. The decision ordered the agency to restore the appellant to his former position.

> "Placing an employee in a former position at a higher grade restores the employee to *status quo ante* ...where the employee would have occupied the former position at the higher grade level but for agency's wrongful demotion."(Taylor v. Department of Treasury, SL075287C0018 (February 5, 1990) at 225, 226).

In its final decision in the petitioner's case, Daniel L Anderson, et. al., v. United States Postal Service, dated September 1, 1994, the Board stated:

> "Having carefully considered the parties' representations on petition for review in light of the evidence of record and our prior decisions, we find that our decisions in *Robinson and White* fully and completely dispose of the issues in these appeals. <u>The agency's actions must be reversed</u>." (Anderson at 3) (Emphasis in original)
>
> . . .
>
> "Finally, in light of these other

findings, and because there was no evidence that the agency had established any competitive levels or competitive areas, or that the appellants' retention standings had been considered in connection with their demotions, in violation of their substantive RIF rights under 5 C.F.R. Part 351 as preference eligibles, the Board concluded that the actions must be reversed. The agency's arguments that it provided them with the equivalent of what they could have gotten had the procedural requirements of the regulations been followed, and therefore that there was no harmful error, the Board found, were not persuasive since an employee's RIF entitlements are substantive in nature and not subject to the harmful error rule." (Anderson at 5)

. . .

'... the appellants . . . are already entitled to retroactive cancellation of their demotions and restoration to the *status quo ante*. (Anderson at 7)

"We ORDER the agency to cancel each appellant's demotion, and restore him or her retroactive to the effective date of that action. *See Kerr v. National Endowment for the Arts*, 726 F.2d 730 (Fed. Cir. 1984). The agency must accomplish these actions within

20 days of the date of this decision." (Anderson at 7) (Emphasis added)

John A. Sink v. U. S. Postal Service, AT-0351-93-0384-X-1 (Dec. 19, 1994) at 9 states:

"White v. U.S. Postal Service , 63 M.S.P.R. 299 (1994), and Robinson v. U.S. Postal Service, 63 M.S.P.R. 307 (1994) are the lead cases with respect to the Board's determinations and ORDERS regarding the demotions resulting from the agency's 1992 realignment. Neither White nor Robinson nor Anderson required the Agency to restructure or to run a RIF. The compliance requirement in each of these cases is to restore the appellants to the *status quo ante*."

Neilson v. Department of Navy , 37 M.S.P.R. 324, 327 (1988) at 326-327 states:

" RIF compliance requires that the appellant be returned to a position that requires duties similar to those of his prior position." 1

3. The United States Supreme Court and the United States Court of Appeals for the Federal Circuit And the Merit Systems Protection Board's Own Precedence Requires Those Unlawfully Removed From Their Positions To Be Restored To The *Status Quo* Ante

"The purpose of an MSPB order cancelling an employee's termination is to place the employee as near as possible in the *status quo ante*." *See Kerr v. National Endowment for the Arts*, 726 F.2d 730 at 733.

Kerr at 733 states:

> "The Supreme Court long ago stated the general rule is, that when a wrong has been done, and the law gives a remedy , the compensation shall be equal to the remedy. The latter is the standard by which the former is measured. The injured party is to be placed as near as may be, in the situation he would have occupied if the wrong had not been committed . (Wicker v. Hoppock, 6 Wall. (73 U.S.) 94, 99, 18 L.Ed. 752 (1867). (Wicker v. Hoppock at 99)

Kerr at 733 also states:

> "the Board's enforcement power over the agency's compliance with the Board's order or decision was intended to be far-reaching. See 5 U.S.C. 1204 Specifically in addition to the formal determination that an individual has been reinstated to a position of equivalent grade and pay , the Board is <u>charged with assuring</u> that an employee has been returned to the *status quo ante*. The Board must make a substantive assessment of

whether the actual duties and responsibilities to which the employee was returned are the same or substantially equivalent in scope and status to the duties held prior to the wrongful discharge." (Emphasis added)

4. The Board is Subject to the Mandates of the Court of Appeals

The Board is bound by the mandates of the Court of Appeals for the Federal Circuit because it is the judicial review authority for Board decisions except decisions regarding discrimination. (5 U.S.C. 7703(b)(1)-(2)) Decisions of the Federal Circuit are controlling authority on the Board. (Fairall v. Veteran's Administration, 33 M.S.P.R. 33 (1987), aff'd, 844 F.2d 775 (Fed. Cir. 1987) at 39.

The Board in Fairall v. Veterans Administration , 33 M.S.P.R. 33 (1987) at 39 states:

"Additionally, we note that, under the doctrine of *stare decisis* as applied by the courts, a question of law that is settled forms a precedent that is applied in all future cases involving the same or a substantially similar question , regardless of the fact that different parties are involved in these future cases. Vail v. Arizona, 207 U.S. 201,205, 28 S.Ct. 107,108, 52

L.Ed. 169 (1907)"

The law of the case doctrine is based on the salutary and sound public policy that litigation should come to an end. The law of the case doctrine has been applied to administrative agency proceedings. Consistency derived from the law of the case doctrine avoids the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions. (Key v. Sullivan , 925 F.2d 1056, 1060 (7th Cir.1991) at 1060, quoting Montana v. United States, 440 U.S. 147, 153-54 (1979).

In contrast the Board has made a radical departure from precedence. *The Board* replaced restoration to the *statu quo ante* with issuance of a Notice of RIF based solely on its assertion that the two remedies are equivalent. The board uses Sink v. United States Postal Service, 68 M. S. P. R. 497 (1995), Unhoch v. United States Postal Service, PH-0351-93-0349-X-1 and Beams v. United States Postal Service, PH-0351093-0361-X-1 as supporting precedence.. All three are postal realignment cases and the support for the latter two is Sink. There are no other precedents called upon by the Board because there are none.

5. When a Board Final Decision Has Been

Issued Administrative Remedies Are Exhausted And The Compliance Period Begins In The Compliance Period The Board's Authority Is Continuing. The Remedy For An Unlawful RIF Is Restoration To The *Status Quo Ante*. The Remedy For An Unlawful RIF Cannot Be Another RIF

Daniel L Anderson, et. al., v United States Postal Service, dated September 1, 1994 is the Final Decision Of The Board in the petitioner's case. (Anderson at 7) 5 C.F.R. 1201.113 Finality of Decisions under part "(e)" states: "Administrative remedies are exhausted when a decision becomes final in accordance with this section". With the issuance of Anderson, the agency had exhausted its appeals, and the compliance period had begun.

McClure v Federal Emergency Management Agency at 676 states:

> "The agency's subsequent RIF action assigning the appellant the position of Education Program Specialist , GS-12, is tainted by the prior improper agency action. The second RIF action cannot serve to correct the agency's procedural lapse in the initial action . . . See Cramton 27 M. S. P. R at 560-61." (Emphasis added)

Kerr holds that:

> "the MSPB erred as a matter of law in

> ruling that its authority over the matter of compliance ended when petitioner resumed active duty in his former position at the same pay and grade. ... Contrary to the Board's characterization ... the compliance issue is not an original "personnel action".. .. The real question here is that of the Board's enforcement power over the agency's compliance with the Board's prior order of April 9, 1981" (Kerr at 732) (Emphasis added)

The Board's order in Kerr of April 9,1981 affirmed the Initial Order to cancel Kerr's dismissal and made it the Board's Final Order. The court ruled that even though Kerr had been given a position with the same title and grade, the Board's compliance action had not ended. As noted above Kerr at 733 states the Board is charged with assuring that an individual is returned to the *statu quo ante*.

Kerr directly parallels the petitioner's case. The Board issued its Final Order in Anderson on September 1, 1995 then treats the compliance action of May 11, 1996 with respect to that Final Order as an original "personnel action" (a new RIF), with a different solution which must be appealed in a new appeal.

CONCLUSION: In light these Public Laws,

United States Court Of Appeals for the Federal Circuit and Merit Systems Protection Board decisions and this court's own holdings, the Board in this case did not decide in accordance with the law and did not follow controlling legal precedence. The law and controlling legal precedence requires the petitioner to be returned to the *status quo ante*. That is his former position to which the Initial Decision in this case states the petitioner is entitled. The Board erred in supplanting the law and binding legal precedence with its own remedy of issuing Notices of RIF. This action has no precedent other than that created in the current postal realignment cases. The Board decision as affirmed by the Court of Appeals sets the stage for greater control of patronage and the elimination of legislated retention rights in the Veterans Preference Act of 1944 and the Civil Service Reform Act of 1978 and alters the doctrine of the law of the case. It is now up to this court to enforce the law by reversing the Court of Appeals for the Federal Circuit's affirmation of the Board's decision in this case.

B. Whether the United States Court of Appeals for The Federal Circuit may in its decisions fail to follow its legislated mandate under the law,

applicable case law, the precedence established by decisions of the Supreme Court and its own decisions in the absence of compelling argument for change?

The United States Court of Appeals for The Federal Circuit in the decision herein subject to a request for writ of certiorari did not act in accordance with:

5 U.S.C. 7703 (a)(2) and 5 C.F.R Sec.7703(c);
5 U. S. C. 3502(c);
5 C. F. R. 351; or,

the precedence in:

Fairall v. Veteran's Administration, 33 M.S.P.R. 33 (1987), aff'd, 844 F.2d 775 (Fed. Cir. 1987) ;
Vail v. Arizona, 207 U.S. 201,205, 28 S.Ct. 107,108, 52 L.Ed. 169 (1907);

Wicker v. Hoppock, 6 Wall. (73 U.S.) 94, 99, 18 L.Ed. 752 (1867);.
Francis P. McCourt v. Robert E. Hampton, et al., 514 F2.d 1365 (1975);
Key v. Sullivan , 925 F.2d 1056, 1060 (7th Cir.1991) and *Montana v. United States*, 440 U.S. 147, 153-54 (1979); and,
Kerr v. National Endowment for the Arts, 726 F.2d 730 (Fed. Cir. 1984).

5 U.S.C. 7703 (a)(2) states:

> "The Board shall be named respondent in any proceeding brought pursuant to this subsection, unless the employee or applicant for employment seeks review of a final order or decision on the merits of the underlying personnel action or on a request for attorney fees, in which case the agency responsible shall be the respondent."

The petitioner appealed to the Circuit Court the Board's failure to follow the law and binding precedence in issuing Notices of RIF in lieu of enforcing its final order. The Board had already determined the merits of the agency's underlying action in its final decision in Anderson, SL-0351-94-0018-I-1. It determined the agency had violated the petitioner's substantive and procedural rights and the petitioner was entitled to restoration to the *status quo ante* which is restoration to one's former position (as ordered in petitioner's Initial Decision) *or a position* the duties and responsibilities of which are the same or substantially equivalent in scope and status to the duties held prior to the wrongful discharge. (Kerr at 733) The Supreme Court's determination is that:

> "The injured party is to be placed as near as may be, in the situation he would have occupied if the wrong had not been committed ." (Wicker v. Hoppock, 6 Wall. (73 U.S.) 94, 99, 18 L.Ed. 752 (1867) at 99)

1. The Court of Appeals Improperly Named The Agency As The Respondent And Failed To Address The Issues Raised By The petitioner. In Doing So It Improperly Denied The Petitioner His Appeal Right Under The Law.

The rules applicable to submissions to the United States Court of Appeals for The Federal Circuit require appellants to name the agency as the respondent. The court then decides whether or not the Board or the agency will be the respondent. In the appeal being reviewed in this submission, the court named the agency as the respondent. The significance here is that the appeal to the court was of the Board's action and not that of the agency. With the agency as the respondent, the question of compliance with "an" order of the Board can be decided without addressing the real issues of the Board's action raised in this appeal.

The appeal was of the Board's failure to enforce its final order in a manner consistent with the applicable statutes and binding legal precedence. The court failed to properly identify and adjudicate the question raised in the appeal and did not adjudicate the legal issues raised essentially denying the appellant appeal rights granted him by law. (5 U. S. C. 7703(a)(1)).

2. The Circuit Court of Appeals Failed To Comply With Its Legislated Mandate In Its Denial Of The Petitioner's Appeal

5 U.S.C Sec.7703(c) states:

> (c) "In any case filed in the United States Court of Appeals for the Federal Circuit, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be--
>
> (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (2) obtained without procedures required by law, rule, or regulation having been followed; or,
>
> (3) unsupported by substantial evidence; "
>
> (Emphasis added)

The evidence provided in the petitioner's appeal document included a discussion of the Board's failure to follow applicable Public Laws and precedence of the Supreme Court and the United States Court of Appeals and the Merit Systems Protection Board as summarized in question "A" above and elsewhere in this document. The Board found and the agency did not use RIF procedures in removing and demoting the petitioner. It is uncontested that the agency action was not in accordance with law and regulation. The Board did not defend its failure to enforce its final order or to require the petitioner's

restoration to the *status quo ante* after determining his substantive and procedural rights had been denied in his removal. Anderson , SL-0351-94-0018-I-1 at 22.

The Court's mandate is clear. The Court of Appeals for the Federal Circuit must set aside the agency actions taken in violation of law and regulation. (5 U.S.C. 7703(c))

It is equally clear the petitioner was denied an appeal of the Board's action. The court in its Decision of April 15,1996 at 3 states:

> "On appeal Bell does not challenge whether the agency complied with the Board's order'

The petitioner's brief at 7, 11 and 21-37 challenged whether the agency complied with the Board's final order. The issue is not compliance with any order but with the Board's final order. The brief also states the Board's order to issue retroactive notices of RIF violated 5 U. S. C. 3502 and 5 C.F.R. 351. (See discussion of question "A" above.) The court's mandate under 5 U.S.C. 7703(c) to hold unlawful and set aside any agency action, findings, or conclusions found to be: not in accordance with law; and, obtained without procedures required by law, rule, or regulation having been followed has not been met.

The opinion continues at 3:

> "Instead, Bell's arguments focus on the propriety of the reduction-in-

force proceedings in July 1995. He argues that these actions do not comply with the agency's governing statutes and regulations.

"We need not address these arguments. The Board did not err when it decided that the agency complied with the Board's prior decision. The agency provided Bell with notice of reduction-in-force in July 1995. Nothing further was required to comply with the Board's order. See Sink v. United States Postal Serv., 68 M.S.P.R. 497 (1995). Bell's arguments go beyond the scope of the compliance proceedings and may be raised in his separate appeal before the Board on the merits of the reduction-in-force."

Sink is not the Boards final order with respect to the petitioner. Here the court supplants the decisions in Hoppick (restore damaged parties to the condition they would have occupied in the absence of the action), Kerr (compliance is not a new personnel action but continuing and the Board being charged with assuring compliance with its final orders) and McClure (a second RIF cannot cure the lapses in a former RIF) with a current M.S.P.B. decision (Sink). It fails to follow the precedence in Key, Vail and Fairall which makes decisions of the Supreme Court and the Court of Appeals For The Federal Circuit binding on the Board and the Court of Appeals in the absence of

substantive argument to the contrary. The Court leans on Sink with no other supporting argument.

The Court states:

> "He argues that these actions do not comply with the agency's governing statutes and regulations."

Based on the arguments in question 1, this is a true statement.

The Circuit Court of Appeals for the Federal Circuit in this decision is supporting the position that the Board need not concern itself with enforcing its final decisions. If the agency will not conform to one order, then issue another. If appellant's rights are violated in one RIF, RIF those who successfully appealed again. It subscribed to issuing retroactive notices of RIF despite the requirement of 5 C. F. R. 351.801 which states:

> "When a reduction in force is caused by circumstances not reasonably foreseeable , the OPM at the request of an agency head or designee, may authorize a notice period of less than 60 days <u>but at least 30 full days before the effective date of release...</u>" (Emphasis added)

The petitioner was removed from his position on October 7, 1992 with no notice. His Notice of RIF was dated and issued

April 17, 1995.

CONCLUSION: The outcome of this decision is evident . It will revamp the law with respect to personnel rights in a RIF without a single piece of the legislation being created or repealed. As almost all competitive employees' retention rights are protected by the regulations 5 C. F. R. 351, the decision affects the substantive rights of over two million people in the career service. The Court in focusing on the agency's single act of obeying an order avoids the truly major issues in this case. The court clearly did not meet its mandate in 5 U.S.C. Sec.7703(c). The decision must be reversed.

For the foregoing reasons, this Court should Grant this petition for a writ of certiorari.

Respectfully submitted:

L. R. Bell

Leslie R. Bell
Petitioner
5302 Augusta Street
Bethesda, MD 20816
Submitted Pro Se
November 25,1996

APPENDIX TO FILING IN

LESLIE R. BELL

V.

UNITED STATES POSTAL SERVICE

NOVEMBER 25, 1996

APPENDIX A: JUDGEMENT IN DOCKET No. 96-3053 LESLIE R. BELL, PETITIONER, V. UNITED STATES POSTAL SERVICE RESPONDENT

NOTE: Pursuant to Fed. Cir. R. 47.6 this dispostion is not citable as precedent. It is a public record. The disposition will appear in tables published periodically.

UNITED STATES COURT of APPEALS for the FEDERAL CIRCUIT

96-3053

LESLIE R. BELL
Petitioner,

v.

UNITED STATES POSTAL SERVICE
Respondent.

JUDGEMENT

ON APPEAL from the MERIT SYSTEMS PROTECTION BOARD
in the CASE NO(S) DC0351930749-X-1

This cause having been heard and considered it is

ORDERED and ADJUDGED:

AFFIRMED

II

ENTERED BY ORDER OF THE COURT
/S/Francis X. Gindhart
Francis X. Gindhart Clerk
DATED: APR 15 1996

ISSUED AS A MANDATE: July 1, 1996

APPENDIX A1: UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT DECISION UNDER DOCKET NUMBER 96-3053, BELL V POSTAL SERVICE

NOTE: Pursuant to Fed. Cir. R. 47.6, this disposition is not citable a s a precedent. It is a public record. The disposition will appear in tables published periodically.

United States Court of Appeals for the Federal Circuit

96-3053

Leslie R. Bell ,
Petitioner ,

v.
United States Postal Service,
Respondent.

DECIDED : April 15, 1996

Before LOURIE: Circuit Judge. Skelton, Senior Circuit Judge , and SCHALL, Circuit Judge.

PER CURIAM.

DECISION

Leslie R. Bell petitions for review of the Merit Systems Protection Board, Docket No. DC0351930749-X-1, dismissing his petition for enforcement of a prior Board decision . Because the Board did not err in finding that the United States Postal Service (the

"agency") complied with the prior Board Decision , we affirm.

DISCUSSION

The agency employed Bell as a Manager, Drafting Branch . As part of restructuring in 1992 and 1993, the agency demoted him to the position of Supervisor , Customer Services, with indefinitesaved grade and frozen salary. Bell appealed to the Board on September 8, 1993, alleging the agency demoted him without using the proper reduction-in-force procedures . The Board consolidated Bell's appeal with that of several other employees affected by the agency's restructuring .

The Board reversed the agency's actions . It determined that the employees' reassignments constituted an improper reduction-in- force even though the agency provided the employees with retained grade and pay. Anderson v. United States Postal Serv., 64 M.S.P.R. 233, 1994; see also Brown v. United States Postal Serv., 58 M.S.P.R. 345, 347-48 (1993). Thus, the Board ordered the agency "to cancel each appellant's demotion , and to restore him or her retroactive to the effective date of that action." Anderson, 64 M.S.P.R. at 238.

Thereafter, Bell and several other postal service employees filed a petition for enforcement, alleging that they had not been restored to in accordance with the Board's order. An administrative judge agreed and ordered that the "the agency must either restore the appellants to their former po8sitions or issue them specific notices of reduction in force consistent with 5 C. F. R. 351.801(a)(1)"

Bell v. United States Postal Serv., No. DC0351930749-C-1 (M.S.P.B. March 9, 1995) In response the agency notified Bell in April 1995 that a reduction-in-force had been conducted and " [a]s a result, effective July 8, 1995, you will be released from the Competitive Level you occupied prior to the 1992-1993 reorganization." The agency submitted a copy of this notice to the Board, which held that the agency in compliance with the Board's order. Thus the Board dismissed Bell's petition for enforcement . Bell appeals. Our review of the Board decision is limited by statute . We may set aside the decision only if it is arbitrary, c2apricious , an abuse of discretion or otherwise not in accordance with law; obtained without procedures required by law , rule or regulation having been followed; or unsupported by substantial evidence. 5 U.S.C § 7703 (c) (1994)

On appeal Bell does not challenge whether the agency complied with the Board's order Instead Bell's arguments focus on the propriety of the reduction-in -force proceedings in July 1995. He argues that these actions do not comply with the agency's governing statutes and regulations.

We need not address these arguments. The Board did not err when it decided that the agency complied with the Board's prior decision. the agency provided Bell notice of a reduction-in-force in July 1995. Nothing further was required to comply with the Board's order. See Sink v. United States Postal Serv ., 68 M.S.P.R. 497 (1995). Bell's arguments go beyond the scope of the compliance proceedings and may be raised in his separately pending appeal

before the Board on the merits of the reduction-in-force.

Petitioners Comments on Opinion:
The court leaves an area for misinterpretation at 2 when it states: "An administrative judge agreed and ordered that the 'the agency must either restore the appellants to their former positions or issue them specific notices of reduction in force consistent with 5 C. F. R. 351.801(a)(1)' Bell v. United States Postal Serv., No. DC0351930749-C-1 "

John A. Sink filed a petition for enforcement with the Atlanta Regional MSPB Office. At that time the agency said it could not comply with the order in the Sink case because of a pending intervention by the OPM. The Atlanta administrative judge found the agency in non-compliance and forwarded Mr. Sink's petition for enforcement to the Board for enforcement. Shortly thereafter while the AJL's decision was at the Board pending its action thereon, the OPM dropped its intervention. The agency then changed its position and said it would conduct a "Compliance RIF". The Board agreed to allow the agency to conduct the "Compliance RIF" in 1995 of those preference eligibles demoted in 1992 and to accept the Notices of RIF issued thereunder as compliance with the Board's order to restore the appellants to their former positions or to the *status quo ante*. It issued its first decision under this determination in Sink v. Postal Service AT-0351-93-0384-X-1 dated December 19,1994. Accordingly the decision was made by the Board to accept a "re-RIF" 30 months after the appellants had been demoted and limit

the RIF to those preference eligibles that had been so demoted in lieu of restoring them to their former positions or the *status quo ante* as ordered. The Board at the agency's request made the decision applicable to all realignment appellant's whose cases were then pending before the Board. This was an inside the beltway decision as was the Circuit Court's decision. The administrative judge's decision in Bell's compliance case, Bell v. Postal Service, DC0351930749-C-1 dated March 9, 1995, the court cited at 2, merely applied the Sink precedence which was the only precedent that established retroactive "reRIF's" as a remedy for violation of substantive and procedural rights.

APPENDIX B: UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT DENIAL OF REVIEW OF ITS DECISION OF APRIL 15,1996

United States Court of Appeals for the Federal Circuit

O R D E R

A combined petition for rehearing and suggestion for rehearing in banc having been filed by the PETITIONER, and the petition for rehearing having been heard by the panel that heard the appeal, and thereafter the suggestion for rehearing in banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the suggestion for rehearing inbanc be, and the same hereby is , DECLINED .

The mandate of the Court will issue on July 1, 1996.

FOR THE COURT,
FRANCIS X. GINDHART, CLERK

Dated: June 24, 1996

By /s/ Brian P. LeDuc
Brian P. LeDuc
Associate Chief Deputy Clerk

cc: LESLIE R. BELL

IX

DAVID G. KARRO

FILED
U.S. COURT
OF APPEALS FOR
THE FEDERAL CIRCUIT
JUN 24, 1996
FRANCIS X. GINDHART CLERK

BELL V USPS, 96-3053
(MSPB - DC0351930749-X-1)

****
* Note: Pursuant to Fed. Cir. R. 47.6 *
* this order is not citable as precedent. *
* It is public record.
****

APPENDIX C: PETITIONER'S FINAL DECISION BEFORE THE MERIT SYSTEMS PROTECTION BOARD- ANDERSON, et al, v. UNITED STATES POSTAL SERVICE, DOCKET No. SL-0351-94-0018-I-1

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

DANIEL L. ANDERSON, et. al., Appellants, [1]	DOCKET NUMBER SL-0351-94-0018-I-1
v.	
UNITED STATES POSTAL SERVICE, Agency.	DATE: SEPT 1, 1994

Michael W. Walker, Kansas City, Missouri, for the appellant Anderson; other appellants variously represented.

Helen Higgins Kelly, Esquire, Chicago, Illinois, for the agency in the Anderson appeal; various representation in other appeals.

BEFORE

Ben L. Erdreich, Chairman

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[1] A list of the appellants affected by this Opinion and Order and the docket numbers of their respective appeals is attached to this decision. These cases are consolidated for purposes of this adjudication only, *see* 5 C.F.R. § 1201.36(b), because consolidation will expedite their adjudication and none of the parties will be prejudiced thereby.

XI

Jessica L. Parks, Vice Chairman
Antonio C. Amador, Member

OPINION AND ORDER

These cases are pending before the Board on peitions for review filed by the agency from initial decisions reversing its actions demoting the appellants. For the reasons stated below, the petitions are DENIED, the appeals are REOPENED on the Board's own motion under 5 C.F.R. § 1201.117, and the initial decisions are AFFIRMED AS MODIFIED herein.

BACKGROUND

Pursuant to its restructuring plan, the agency informed each of the appellants that his or her job was abolished, and offered them new positions at lower grade levels, either within their official pay grading system or in a different system. Although it announced at the time it took these actions that it would provide the appellants with only frozen grade and pay, the agency subsequently afforded them a more generous benefit. Each of the appellants filed an appeal from these actions.

The administrative judges assigned to their appeals all reversed the agency's actions. These decisions were in acord with the Board's earlier decisions in *Brown v. U.S. Postal service*, 58 M.S.P.R. 345 (1993), and *DiPietro v. U.S. Postal Service*, 58 M.S.P.R. 430 (1993), in which the Board held that the agency's restructuring constituted a reduction in

force (RIF); that the offers of positions at lower grade levels constituted demotions; that the fact that the appellants may have "accepted" the jobs offered did not constitute a voluntary acquiescence that changed the nature of the actions; and that the actions must be reversed as to these preference eligibles because of the agency's failure to afford them any of the substantive protections of 5 C.F.R. Part 351. Thus, the administrative judges ordered the cancellation of the actions. The agency filed petitions for review of these decisions.

Because the Office of Personnel Management (OPM) intervened in two other appeals, *Robinson v. U.S. Postal Service*, MSPB Docket No. DA0351930363, and *White v. U.S. Postal Service*, MSPB Docket No. PH0351930312-I-1, the Board stayed proceedings in many of these cases pending the final outcome of its consideration of that petition. On June 24, 1994, the Board issued decisions in *Robinson and White, and has lifted the stay. See Korthof v. U.S. Postal Service*, MSPB Docket No. SF-0351930436-R-1 (July 15, 1994). Accordingly, these appeals may now be finally adjudicated.

ANALYSIS

Having carefully considered the parties' representations on petition for review[2] in light of the evidence of record

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2

On August 8, 1995 the appellannt filed an appeal of the agency's In these cross petitions for review, the appellants challenge the

and our prior decisions, we find that our decisions in *Robinson and White* fully and completely dispose of the issues in these appeals.
The agency's actions must be reversed.

In *Robinson*, the Board reaffirmed its earlier dispositive holding in *Brown and DiPietro* and found the following. First, it discussed the agency's stated intent in providing only limited grade and pay retention, but determined that, for jurisdictional purposes, it would consider the appellants' assignements as having been accompanied by "indefinite and full saved grade and pay."

Second, it rejected the argument that when OPM revised the RIF regulations in 1983 to eliminate a reassignment not involving displacement as an appealable RIF action, it thereby effectively eliminated the right of appeal where the employee's grade, pay or tenure has not been affected. It therefore concluded that the Board did not lack jurisdiction over cases arising from the restructuring for this reason. After further consideration and analysis,

---

administrative judges' denials of interim relief. As noted *infra* in this Opinion and order, any interim relief issues are now moot and need not be addressed further at this time.

We note that some appellants have filed pleadings that are entitled "Cross Petition for Review" or the like, but do not challenge any of the administrative judges' dispositive rulings in the initial decisions and are, in fact, responses to the agency's petitions for review. We have therefore considered them as such.

it then concluded that the appellants' assignments constituted demotions, not reassignments. In so holding, the Board applied the definition of "demotion" found at 5 C.F.R. § 210.102(b)(4), and held that the appellants' change, either within the PCES or EAS pay system, or from the former to the latter, constituted an action that fit the regulatory definition. Nor did it find persuasive the agency's argument that it has broader authority that allows it special flexibility in matters of compensation that should be viewed as distinguishing these actions from the RIF actions taken by agencies without such authority. Whether the agency has such authority, the Board found, was not the issue, inasmuch as the definition of demotion has not been changed to reflect it, so that an exemption was not warranted.

The Board also concluded that the fact that an appellant accepted the change to a lower graded position offered by the agency did not cause that assignment to be a voluntary action over which the Board lacks jurisdiction. It reached this conclusion because at the time the offers were accepted, the appellants had already been told that they would not be retained in their former positions or placed in another at the same grade. Moreover, the offers were accompanied by statements that additional placement opportunities would diminish if they awaited future offers. It therefore found that these offers differ from the pre-RIF offers encouraged to diminish the harsh effects that RIF actions can cause. Thus, the agency's offers here were not distinguishable from the offers made by other agencies during a RIF which, by regulation, do not defeat the right of appeal simply because they are not rejected.

Finally, in light of these other findings, and because there was no evidence that the agency had established any competitive levels or competitive areas, or that the appellants' retention standings had been considered in connection with their demotions, in violation of their substantive RIF rights under 5 C.F.R. Part 351 as preference eligibles, the Board concluded that the actions must be reversed. The agency's arguments that it provided them with the equivalent of what they could have gotten had the procedural requirements of the regulations been followed, and therefore that there was no harmful error, the Board found, were not persuasive since an employee's RIF entitlements are substantive in nature and not subject to the harmful error rule.

Upon consideration of the agency's petitions in the instant cases, we find the legal issues raised have been addressed and resolved by the Board in *Robinson* and *White*, that the administrative judges' findings as to those legal issues are consistent with our recent holdings, and that any inconsistency would not affect the outcome of these appeals.[3] In addition, to the extent that the arguments raised relate to the administrative judges' factual

---

[3] We note that some of the parties have raised arguments that are not specifically addressed in this Opinion and Order (or in *Robinson* and *White*). We find it unnecessary, however, to address these arguments individually because they are not material to the disposition of these appeals, nor need we address other issues that were initially raised on appeal below but were not reargued in a timely petition for review or cross petition for review.

determinations, we find that the parties have not demonstrated any factual error by the administrative judges, based on specific references to the record, sufficient to warrant the Board's full review of the record. *See Weaver v. Department of the Navy*, 2 M.S.P.R. 129, 133-34 (1980) (mere disagreement with the administrative judge's findings and credibility determinations does not warrant full review of the record by the Board), *review denied*, 669 F.2d 613 (9th Cir. 1982) (per curiam).

The interim relief issues in any of these appeals are moot.

In certain of these appeals, the administrative judges ordered that, if it filed a petition for review, the agency was required to grant the appellant interim relief in accordance with 5 U.S.C. § 7701(b)(2). In our Order in *Korthof v. U.S. Postal Service*, MSPB Docket No. SF-0351930436-I-1 (Jan. 26, 1994), we stayed the interim relief orders. Although the stay was subsequently lifted for all other purposes, the stay as it pertains to interim relief remained in effect. *Korthof*, MSPB Docket No. SF-0351930436-R-1, Order dated July 15, 1994. The parties in many of the cases in which interim relief was ordered have submitted arguments on the propriety of both the order and the agency's actions in complying with it, but we find that we need not address these matters on their merits.

Where an appellant has otherwise received all of the relief he requested, or gained all of the benefit from a decision on another, the matter is moot. *See, e.g., Malone v. Department of Treasury*, 57 *M.S.P.R. 606, 609 (1992), aff'd, 979 f.2d*

217 (Fed. Cir. 1992) (Table). Here, the appellants would be in no better position were we to adjudicate any claims based on interim relief, since as a result of our decision on the issue of jurisdiction, they are already entitled to retroactive cancellation of their demotions and restoration to the *status quo ante*. A case is moot where the parties lack a legally cognizable interest in the outcome, *Kozer v. Office of Personnel Management*, 45 M.S.P.R. 505, 507 (1990), *aff'd*, 925 F.2d 1479 (Fed. Cir. 1991) (Table); moreover, the Board may not issue advisory opinions. *See* 5 U.S.C. § 1205(h). We conclude, therefore, that the interim relief issues in these appeals are moot, and we will not address them further.

We ORDER the agency to cancel each appellant's demotion, and restore him or her retroactive to the effective date of that action. *See Kerr v. National Endowment for the Arts*, 726 F.2d 730 (Fed. Cir. 1984). The agency must accomplish these actions within 20 days of the date of this decision.

We also ORDER the agency to issue a check to each appellant for the appropriate amount of back pay, interest on back pay, and other benefits under Postal Service regulations, no later than 60 calendar days after the date of this decision. We ORDER each appellant to cooperate in good faith in the agency's efforts to compute the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it comply. If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the agency to issue a check to each appellant for the

undisputed amount no later than 60 calendar days after the date of this decision.

We further ORDER the agency to inform each appellant in writing of all actions taken to comply with the Board's Order and of the date on which the agency believes it has fully complied. If not notified, each appellant should ask the agency about its efforts to comply.

Within 30 days of the agency's notification of compliance, each appellant may file a petition for enforcement with the appropriate regional office to resolve any disputed compliance issue or issues. Any such petition should contain specific reasons why the appellant believes that there is *insufficient* compliance, and should include the dates and results of any communications with the agency about compliance.

ORDER

This is the final order of the Merit Systems Protection Board in these appeals. 5 C.F.R. § 1201.133(c).

NOTICE TO THE APPELLANTS

You have the right to request the united States Court of appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for

review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

FOR THE BOARD: /s/ Shannon McCarthy
for
Robert E. Taylor
Clerk of the Board

Washington, D.C.

APPENDIX

ANDERSON, DANIEL L. SL-0351-94-0018-I-1
ANDERSON, HARRY D. PH-0351-93-0668-I-1
BELL, LESLIE DC-0351-93-0749-I-1
BLACK, WILLIAM DE-0351-93-0503-I-1
BLACKMAN, JAMES SF-0351-94-0018-I-1
BORKGREN, RONALD SF-0752-93-0728-I-1
BREWER, ARTHUR AT-0351-93-0726-I-1
BROWN, EDWARD SL-0752-93-0054-I-1
BURNETT, RANDALL AT-0351-93-0352-I-1
CAMPBELL, JAMES T. DA-0351-93-0543-I-1
CENTEIO, JASON SE-0351-93-0246-I-1
CLARK, ROBERT AT-0351-93-0769-I-1
COLLINS, ERNEST J. DC-0351-94-0050-I-1
COLON, DAVID DC-0351-93-0742-I-1
CONOVER, CARL DC-0351-93-0726-I-1
COOK, JOHN DA-0351-93-0311-I-1
COOKE, CURTIS DA-0351-93-0560-I-1
CRANDALL, RUSSELL SF-0351-94-0019-I-1
CULHANE, WILLIAM DC-0351-93-0747-I-1
CUNNINGHAM, RAYMOND DC-0351-93-0730-I-1
DAVIS, LAWRENCE DC-0351-93-0672-I-1
DICKINSON, ROBERT R. DE-0351-94-0016-I-1
DOMAN, BRUCE I. NY-0752-93-0525-I-1
EATON, JAMES AT-0351-93-0523-I-1
EVANS, MILTON PH-0351-93-0249-I-1
EVANS, ROY L. SL-0351-93-0391-I-1
FEDELI, ERNEST CH-0351-93-0583-I-1
FLAHERTY, PATRICK DE-0752-93-0327-I-1
FOGEL, GERALD AT-0351-93-0779-I-1
FOX, PHILLIP A. SE-0351-93-0399-I-1
GEPPERT, WILLIAM G., JR. SF-0351-93-0819-I-1
GILDEA, THOMAS NY-0351-93-0193-I-1
GONZALES, BENNY DA-0351-93-0280-I-1
GREER, TIMOTHY G. SF-0351-94-0077-I-1
GUTHRIE, V. PARL SE-0351-93-0290-I-1
HALL, ELBERT AT-0351-93-0502-I-1
HANSON, LARRY SE-0351-93-0120-I-1
HARVEY, JOHN SL-0351-93-0383-I-1
HELTON, JAMES AT-0351-93-0233-I-1
HEMMEN, TERRY DE-0752-93-0303-I-1

HESSMANN, GEORGE DC-0351-93-0770-I-1
HOHBEIN, EARL DC-0351-93-0668-I-1
HOWARD, BERNARD DC-0351-93-0714-I-1
IMBODEN, THURMAN AT-0351-93-0825-I-1
JEDLICKA, PHILIP DA-0351-93-0548-I-1
JOHNSON, DAVID R. SF-0351-93-0771-I-1
KENNEDY, RODERICK AT-0351-93-0832-I-1
LAWSON, JOHN W. DC-0351-93-0760-I-1
LEE, ALFRED F. SF-0351-93-0739-I-1

APPENDIX D: PETIONER'S INITIAL DECISION BEFORE THE MERIT SYSTEMS PROTECTION BOARD DATED OCTOBER 29, 1993

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

Leslie R. Bell, Appellant,	:
	:DOCKET NUMBER
	:DC-0351-93-0749-
	:I-1
V.	:
	:DATE: Oct 29,
UNITED STATES POSTAL SERVICE,	:1993
	:
Agency.	:
	:

Gary Howard Simpson, Esquire,
Bethesda, Maryland, for the appellant.

Mary Anne Gibbons, Esquire,
Washington, D.C., for the agency.

BEFORE

Elizabeth B. Bogle
Administrative Law Judge

INITIAL DECISION

On September 8, 1993, the appellant filed an appeal alleging that the agency improperly demoted him from the position of Manager, Drafting Branch, EAS-27, to the position of Supervisor, Customer Services,

EAS-16, without using reduction-in-force procedures. For the following reasons, the agency action is REVERSED.

Background

The appellant occupied the position of Manager, Drafting Branch, EAS 27. As a result of the restructuring of the U.S. Postal Service, the appellant's position was eliminated and new positions were created. *See* declaration of Joseph J. Mahon, Jr. On August 19, 1993, the agency directed the appellant's assignment to the position of Supervisor, Customer Services, an EAS-16 position. He began serving in that position beginning on August 21, 1993, with indefinite saved grade and frozen salary. *Id.* The appellant appealed to the Board on September 8, 1993, alleging that the agency improperly demoted him without using reduction-in-force procedures.

Reduction in force

In *Brown v. U.S. Postal Service*, 58 M.S.P.R. 345, 348 (1993), the Board held that the restructuring of the U.S. Postal Service constituted a reorganization under 5 C.F.R. § 351.203. It also held that when the agency assigned an employee to a position at a grade level different from that of his former position during the reorganization, the employee had been released from his competitive level in accordance with 5 C.F.R. § 351.403(a). *Id.* The Board rejected the agency argument, also made in this case, that the employee had not been demoted because he was given indefinite retained grade and pay. *Id.* At 350-51.

The appellant in this case is a preference eligible who would be entitled to appeal a reduction in force to the Board. *See* 39 U.S.C. § 1005(a)(2). The appellant's position was abolished during the restructuring of the U.S. Postal Service and he was demoted when he was assigned to a lower grade position. Based on the Board's analysis in *Brown*, I find that the appellant was affected by an appealable reduction in force.

When an agency takes a reduction-in-force action but fails to use reduction-in-force procedures, it has violated the employee's substantive and procedural reduction-in-force rights, and the action must be reversed. *See McClure v. Federal Emergency Management Agency*, 32 M.S.P.R. 672, 676 (1987). It is undisputed that the agency did not use reduction-in-force procedures to demote the appellant. Accordingly, the action must be reversed.

Because, under *Brown*, the appellant is entitled to the full relief he requested, the hearing he requested is not warranted.

DECISION

The agency's action is REVERSED

ORDER

The agency is ORDERED to cancel the demotion and retroactively restore appellant to his former position effective August 21, 1993. This action must be accomplished no later than 20 calendar days after the date this initial decision becomes final.

The agency is also ORDERED to issue a check to the appellant for the appropriate

amount of back pay, with interest, and to adjust benefits with appropriate credits and deductions in accordance with Office of Personnel Management's regulations, no later than 60 calendar days after the date this initial decision becomes final.

Appellant is ORDERED to cooperate in good faith with the agency's efforts to compute the amount of back pay and benefits due and to provide all necessary information requested by the agency to help it comply.

If there is a dispute about the amount of back pay due, the agency is ORDERED to issue a check to appellant for the undisputed amount no later than 60 calendar days after the date this initial decision becomes final. Appellant may then file a petition for enforcement with this office to resolve the disputed amount.

The agency is further ORDERED to inform appellant in writing of all actions taken to comply with the Board's Order and the date on which it believes it has fully complied. If not notified, appellant should ask the agency about its efforts to comply.

INTERIM RELIEF

If a petition for review is filed, I ORDER the agency to provide interim relief to appellant in accordance with Section 6 of the Whistleblower Protection Act of 1989, U.S.C. § 7701(b)(2)(A). The relief shall be effective upon the issuance of this decision and will remain in effect until the decision of the Board becomes final.

FOR THE BOARD: /s/ Elizabeth B. Bogle

Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on December 3, 1993, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is the last day on which you can file a petition for review with the Board. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeal as for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file your petition with:

The Clerk of the Board
Merit Systems Protection Board
1120 Vermont Avenue, NW.. Suite 806
Washington, DC 20419

Your petition must be postmarked or hand-delivered no later than the date this initial decision becomes final. If you fail to provide a statement with your petition that you have either mailed or hand-delivered a copy of your petition to the agency, your petition will be rejected

and returned to you.

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW.
Washington, DC 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be received by the court no later than 30 calendar days after the date this initial decision becomes final.

ATTORNEY FEES

If no petition for review is filed, you may ask for the payment of attorney fees and costs by filing a motion with this office no later then 20 calendar days after the date this initial decision becomes final. Any such motion must be prepared in accordance with the provisions of 5 U.S.C. § 7701(g) and 1221(g), 5 C.F.R. § 1209.10, 5 C.F.R. § 1201.37(a) (1991), and applicable case law.

ENFORCEMENT

If, after the agency has informed you that it has fully complied with this decision, you believe that there has not been full compliance, you may ask the Board to enforce its decision by filing a motion with this office no later than 30 calendar days after the date of the agency's

notification of compliance.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

CERTIFICATE OF SERVICE

I certify that the attached Document ws sent by regular mail this day to each of the following:

Appellant

Leslie R. Bell
5302 Augusta St.
Bethesda, MD 20016

Appellant's Representative

Gary Howard Simpson
9505 Kingsley Avenue
Bethesda, MD 20814

Agency's Representative

Mary Anne Gibbons
U.S. Postal Service
Law Department, Mid-Atlantic
475 L'Enfant Plaza, SW.,
Rm. 6147
Washington, DC 20260-1160

Other

Marjorie Marks
U.S. Office of Personnel Mgmt.

XXIX

Employee Relations Division
1900 E Street, NW
Room 7412
Washington, DC 20415

October 29, 1993 (date)

/s/ Vicki Falk
Legal Assistant

APPENDIX E: MERIT SYSTEMS PROTECTION BOARD'S SECOND FINAL DECISION UNDER DOCKET No. DC-0351-93-0749-X-1, LESLIE R. BELL, APPELLANT, v. UNITED STATES POSTAL SERVICE, AGENCY DATED NOVEMBER 1,1995.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

LESLIE R. BELL,	:DOCKET NUMBER
Appellant,	:DC-0351-93-
	:0749-X-1[4]
v.	:Nov. 1,1995
	:
UNITED STATES POSTAL SERVICE,	:
Agency	:

Gary H. Simpson, Esquire, Bethesda, Maryland for the appellant.

Mary Anne Gibbons, Esquire, Washignton, D.C., for the agency.

BEFORE

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[4] The docket number below was DC-0351-93-0749-C-1. This case was one of a number of cases arising out of the agency's 1992-93 restructuring that were consolidated with *Anderson v. U.S. Postal Service*, 64 M.S.P.R. 233, 238 (1994), at the petition for review stage.

Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair
Antonio C. Amador, Member

OPINION AND ORDER

This case, arising out of the agency's 1992-93 nationwide restructuring, is before the Board pursuant to the March 9, 1995, Recommendation issued by the administrative judge on the appellant's petition for enforcement. The administrative judge found that the agency was not in compliance with the Board's final order finding that the agency's 1992-93 restructuring improperly circumvented the reduction in force (RIF) regulations.

In *Sink v. U.S.Postal Service*, 65 M.S.P.R. 628, 636 (1994), the Board found that compliance with a materially identical Board final order could be effected by (a) restoring the appellant to the position he held prior to the agency's 1992-93 nationwide restructuring, or (b) issuing the appellant a specific RIF notice consistent with 5 C.F.R. § 351.801(a)(1) by April 18, 1995. Subsequently, the Board applied its decision in *Sink*, including the April 18, 1995 deadline for issuance of the specific RIF notices, to all compliance cases arising from the restructuring. *See Unhoch v. U.S. Postal Service*, 66 M.S.P.R. 651, 655-56 (1995).

The agency has submitted evidence, including a copy of the timely issued specific notice of RIF that ws sent to the appellant, to show that it is now in compliance with the Board's compliance order. The Board issued a notice to the appellant providing him with an opportunity to respond to the agency's

evidence of cocmpliance. In his response, the appellant contends that the agency abolished his former job and created two new positions for it. He therefore claims that he should be given one of the two newly created jobs.

The appellant's objections to the evidence of compliance go beyond the scope of this compliance proceeding and address the merits of the RIF itself. See *Sink v. U.S.Postal Service*, MSPB Docket No. AT-0351-93-0384-X-1 (Oct. 17, 1995). By issuing the notice, the agency completed the actions required to be in compliance with our decision. To the extent that the appellant is raising objections to the substance of the 1995 RIF, they are properly brought in a separate action.[5] Accordingly, the appellant's petition for enforcement is hereby DISMISSED.

ORDER

This is the final order of the Merit Systems Protection Board in this case. 5 C.F.R. § 1201.113(c).

NOTICE TO THE APPELLANT REGARDING FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal

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[5] On August 8, 1995, the appellant filed an appeal of the agency's compliance RIF action with the Board's Washington Regional Office. *See Bell v. U.S. Postal Service*, MSPB Docket No. DC-0351-95-0714-I-1.

Circuit to review the Board's final decision in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
For the Federal Circuit
717 Madison Place, N. W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your represetative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C § 7703(b)(1).

FOR THE BOARD
Washington,D.C.

/s/ Robert E. Taylor
Robert E. Taylor
Clerk of the Board